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Supreme Court, U.S.
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No. 98-964

IN THE

Supreme Court of the United States

October Term 1998

DILAWAR M. EDWARDS, Ph.D.,

Petitioner,

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; Nancy Z. Nelson, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean, in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The Respondents Distort the Factual Background of the Case

Respondents erroneously assert that this case is about Petitioner being prevented from using classroom materials which the University "decided had no bearing on the education course which he had been assigned to teach." Br. 1.

The record is clear that the materials in dispute were relevant to the subject of the course. Petitioner presented the testimony of three experts in education who so testified. Pet. 4-5. Petitioner's syllabi for the course won praise from his former Department head, and a commendation from one of the Respondents. Pet. 2-3, n. 1. A national accrediting organization found nothing wrong with the syllabus created by Petitioner, which contained the reading list banned by the Respondents. *Id.* The Court of Appeals made no finding that the disputed materials were inappropriate. Pet. A-6-9.

Unit three, which contained the matter deemed objectionable by the Respondents, dealt with, among other things, censorship and bias in the selection of textbooks and classroom materials. One of the Respondents admitted that such matters are appropriate for that class. Pet. 5, n. 4.

Because it cannot be said that Petitioner's materials "ha[ve] no relation to his/her subject," the written policies of the University contained in the Collective Bargaining Agreement ("CBA") ceded the authority to chose, and use, those materials to the Petitioner. Pet. 3.

Further, the unanimous testimony at trial was that Dr. Edwards did not use the materials, or his class, as a pulpit for his own personal views on religion, and that his own religious views were not even apparent to his students. Pet. 4.

Rather, the actions of the Respondents, from top to bottom, were motivated by a desire to suppress the use of materials because of their viewpoints; viewpoints which, as

the Court of Appeals noted, had been forbidden by the University as constituting "'doctrinaire material[s]' of a religious nature." Pet. A-3. By revoking, solely on viewpoint factors and solely as to Petitioner only, the benefits of a forum[1] created so that faculty could freely chose, and use, their own class materials, the University officials violated the First Amendment. *Perry Educational Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 49, n. 9 (1983).

The record is replete with evidence not only of viewpoint censorship and book-banning by the University, but of outright religious bigotry against Dr. Edwards because of the perception by the administrators that he belonged to the "fundamentalist" religious "spectrum." Pet. 6.

The Respondents further distort the record by asserting that Petitioner "revised the course syllabus to include materials advocating the teaching of 'creationism' and attacking the teaching of evolution..." Br. 1. By Respondents' reasoning we should conclude that a professor of Russian history becomes an advocate of communism by having his students read *Das Kapital*. Such a conclusion is absurd. Petitioner was simply exposing his students, in a class unit dealing with issues of bias and censorship in class materials selection, to those issues having currency in public debate. Pet. 4, n. 3.

If this Court did not feel that the threat of communism was a sufficient and necessary cause to infringe academic freedom under the First Amendment in *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967), surely Dr. Edwards exposing students to the public controversy surrounding the teaching of evolution, or community objections to "humanism" in textbooks is no greater threat to the Republic.

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[1] A "forum" can be one which exists "more in a metaphysical than in a spatial or geographical sense, but the same principals apply." *Rosenberger v. University of Va.*, 515 U.S. 819, 132 L.Ed.2d 700, 716 (1995), citing *Perry Ed. Assn., supra.*

Nor are Respondents correct that the University received complaints from "students" about Petitioners' teaching of unit three of the class. Br. 1. The Court of Appeals noted that "*one* of Dr. Edwards students complained to University officials . . ." Pet. A-3 (emphasis added).

Respondents are further inaccurate in asserting that "petitioner failed to comply with the administration's request" regarding the disputed materials. Br. 1. In fact, Petitioner ceased using the disputed materials that were on the list of banned materials, a fact that points out the chilling effect of the University's "cease and desist" order. When Respondent Watkins demanded that Petitioner stop using the disputed "handouts," App. Vol. I, at 339-348, Dr. Edwards complied. App. Vol. IV, Tr. Feb. 20, at 103. When Dean Nelson demanded that he use a broader base of materials, Dr. Edwards complied. *Id.* At 93. Dr. Edwards even invited the administrators to observe his teaching. *Id.*, at 118.

In fact, Dr. Edwards consistently sought guidance from the University officials on what books and materials were being banned, and the definition of their phrase "doctrinaire material of a religious sort," so that he could steer clear of the prohibited areas. App. Vol. I, at 368 (memo to Respondent Nelson); *Id.*, pgs. 382-383 (memo to University President Watkins). This risk of a tenured professor, like Dr. Edwards, being coerced to "stay as far as possible from utterances or acts which might jeopardize his living" was at the root of this Court's development of the concept of academic freedom. *Keyishian*, at 385 U.S. 601.

Respondents minimize the manner in which Petitioner was suspended from his teaching duties, indicating that "petitioner claimed he was unprepared" to discuss the concerns of his superiors over the issue, thus prompting the suspension. Br. 2. In fact, as the Court of Appeals observed, the Respondents mailed the packet of materials relating to their charges against Dr. Edwards on the Friday preceding the Monday meeting. Pet. A-5. This virtually insured that Petitioner would not have them when he went to work on

Monday, the same day on which the Respondents would first notify Dr. Edwards of the fact of the hearing being conducted against him. Dr. Edwards did not know the *nature* of the charges until he walked into the hearing.

REASONS FOR GRANTING THE WRIT

The Respondents Misconstrue the Law

Respondents wrongly argue that the Court of Appeals' decision involved the narrow issue of the right of a University to determine its own "curriculum." Br. 4. Both the Third Circuit opinion and the Respondents fail to distinguish between the University's right to determine *curriculum* (i.e. the general course of study offered) and the professor's right (under the CBA) to determine the precise materials and matters covered in a specific *course*.[2]

Apart from that, the University had already determined in the CBA that individual "*faculty*" had the right to determine the precise teachings, discussions, and materials to be used in a given course. Pet. 3. Respondents citation to *Rosenberger v. University of Va.*, 515 U.S. 819, 132 L.Ed.2d 700 (1995) is unavailing. There this Court noted:

> The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional . . ."

132 L.Ed.2d at 716. However, the issue presented by this case, never before decided by this Court, is whether the delegation of decision-making on the content of class materials to professors represents a situation akin to "encourag[ing] a diversity of views" rather than creating a situation where the class materials are deemed "the

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[2] See: *The New Merriam-Webster Dictionary* (1989):"Curriculum: . . . a course of study offered by a *school or one of its divisions*." Compare: "*Course: ... a series of instruction periods dealing with a subject.*"

University's own speech" for First Amendment purposes. *Id.* at 718. None of the Supreme Court cases cited by Respondents, Br. 4-5, ever decided that.

Respondents argue that the "substantial departure" rule of *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) was not argued before the Third Circuit. Br. 5. But the Third Circuit based its decision on *Ewing*, even though none of the parties (including Respondents) cited or relied on it.

Respondents are flatly wrong in asserting (Br. 5, n. 2) that the First Amendment rights of public employees require the showing of a "property" or "liberty" interest (confusing it with the Fourteenth Amendment due process context), and the cases cited simply do *not* say that.

Respondents' assertions that there is a consensus of opinion among the circuits, and that the "only" curriculum-related case cited by the Petitioner is *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991) *cert. denied* 505 U.S. 1218 (1992) are both plainly incorrect.

Not addressed in Respondents' brief are cases vindicating the First Amendment rights of professors in classroom-related expression, which were cited by Petitioner: *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-972 (9th Cir. 1996)(sexual harassment policy of university violated First Amendment rights to classroom speech); *Parate v. Isibor*, 868 F.2d 821, 827-828 (6th Cir. 1989)(university interference with professor's assignment of student grade unconstitutional). *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) is noted by the Respondents (Br. 6) but they fail to address the holding in the case that the expression of the professor, including his in-class discussions are protected by the First Amendment.

As for *Bishop v. Aranov*, *supra*, the Court of Appeals itself noted the apparent conflict between *Bishop* and the Third Circuit. See: Pet. A-7.

Lastly, Respondents opine that the result in this case would have been the same even if the Third Circuit had engaged in the balancing test required by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), Br. 7, n. 3. Because Petitioner's case was supported by the unanimous testimony of three experts and three students, and Respondents' hostile animus was undeniably viewpoint based, and the jury was given no guidance for the key constitutional factor to be decided, that argument is meritless.

CONCLUSION

For the foregoing reasons we request that this Court grant the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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